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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/917,494	07/26/2001	Samuel L. Forusz	70452P002	9795

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BLAKELY SOKOLOFF TAYLOR & ZAFMAN  
12400 WILSHIRE BOULEVARD, SEVENTH FLOOR  
LOS ANGELES, CA 90025

EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

12

DATE MAILED: 08/04/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

AS7

# Office Action Summary

Application No.

09/917,494

Applicant(s)

FORUSZ ET AL.

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 17 April 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 6-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

This application has been withdrawn from issue in favor of the following rejection and in favor of the following 112 rejection.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-4, 6-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1 and 10 are indefinite in the use of the phrase 'consisting essentially of'. The scope of the claims is no longer known. The burden is on Applicants to disclose what is excluded by the phrase "consisting essentially of". See MPEP 211.03. Applicants must state what materials are excluded that materially effects the basic and novel characteristics of the claimed invention. In addition, the invention teaches away from using the phrase "consisting essentially of" because on page 4, para. [0009] lines 6-8, the specification states that "Other suitable second soluble fibers include, but are not limited to, polydextrose and acacia gum, used alone or in combination with another second fiber".

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, 6-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Frippiat et al. or Harada et al. or Stillman in view of Green (EP 0756 828), Topping (6,245,326) and Paul (5,744,1340).

Frippiat et al. disclose a composition containing inulin and a second soluble fiber, which is xanthan, carob, carboxymethylcellulose, carrageenan, or alginate (col. 20, lines 35-44 and lines 56-64). Harada et al. disclose a drink, which contains a polyfructan, which can be inulin as in claim 1 (abstract and col. 3, lines 68-70 and col. 4, lines 10-15, and lines 20-21). Topping discloses a composition containing psyllium, inulin and maltodextrin (col. 4, lines 7-9 and lines 64-68). Paul discloses a composition containing inulin, maltodextrin and other soluble gums such as pectin and guar gum. No patentable distinction is seen at this time in the use of one soluble gum instead of another soluble gum absent a showing that the claimed viscosity cannot be achieved by the use of the cited gums (col. 16, lines 1-2, and lines 58-60). Stillman discloses a beverage which contains inulin and guar gum (col. 15, lines 60-66). Claim 1 differs from the references in the particular viscosity of the beverage. However, it is not seen at this time that the viscosity is not within the claimed amount because the references disclose inulin and fibers in a beverage and no concentration of inulin and fibers is stated in the claim to arrive at the particular viscosity (col. 16, lines 35-68). Applicants' specification discloses the use of a concentration up to 6% of inulin (page 4, para. 0012). As the amount of inulin is known, this would have made the claimed viscosity. Green discloses

as to claim 1, a soluble fiber, inulin and a second soluble fiber in amounts from 8-40% as in a dry mix (col. 3, lines 12-30). The composition of the reference can be mixed with water in amounts of 2 grams, which surely has a viscosity of less than 1.4 cp or less. Nothing is seen that this is not the case (col. 4, lines 36-41 of Green). Therefore, it would have been obvious to use enough inulin and fibers in a beverage to obtain a particular viscosity.

Claims 2 and 3 require a particular amount of soluble fiber in the composition. However, as it is known to add fiber to beverages, it would have been within the skill of the ordinary worker to add particular amounts depending on the type of fiber.

Therefore, it would have been obvious to add various amounts of fiber to a beverage.

Claim 4 further requires ascorbic acid, and claim 5, a pH of less than six. Christine et al. disclose pH's of from 3-6 (fig. 1). Ascorbic acid is a well known acidulent and nothing new is seen in its use, particularly as it is often found in fruit juices which are common beverage ingredients. Therefore, it would have been obvious to use known acids, at within the claimed pH to make a beverage.

Claims 6 and 7 further require administering the beverage for human consumption. Foods and beverages using food safe ingredients are generally considered to be used for human consumption. Therefore, it would have been obvious to administer the beverage to humans.

Claim 8 further requires that the beverage is prepared from a dried mix and claim 9 that the dry mix is mixed with water. Nothing new is seen in a beverage composition, which is in the form of a dry mix to be added to water as in KOOL-ADE (Trademark) or

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other dry mixes. Also, Green et al. disclose a dried mixture of fibers and oligosaccharides (abstract), which can be added to water (col. 2, lines 53-55, col. 4, lines 30-50). Therefore, it would have been obvious to add a dry fiber mixture to water to make a beverage.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 6-12-03

  
**HELEN PRATT**  
**PRIMARY EXAMINER**